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In the Supreme Court
of the United States

OCTOBER TERM, [redacted] 1969

Case No. [redacted]
245

CAROL DERRINGTON,

Petitioner,

v.

THE CITY OF PORTLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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In the Supreme Court
of the United States

OCTOBER TERM, 1968

Case No. .....

CAROL DERRINGTON,

Petitioner,

v.

THE CITY OF PORTLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Oregon in the above entitled case (entitled below "The City of Portland, Plaintiff-Appellant, versus Carol Derrington, Defendant-Respondent") entered on February 26, 1969, reversing the judgment Order of the Circuit Court of the State of Oregon for the County of Multnomah sustaining petitioner's demurrer to the complaint filed against her and dismissing the cause against her.

OPINIONS BELOW

The Memorandum Opinion, dated February 24, 1967, of Philip T. Abraham, Municipal Court Judge, is unreported. It is printed in Appendix A hereto. The Memorandum Opinion, dated September 6, 1967, of James M. Burns, Circuit Judge, is unreported. It is printed in Appendix B hereto.

The opinion, dated February 26, 1969, of The Supreme Court of the State of Oregon is reported at 87 Adv. Sh. 1041, — Or. —, 451 P.2d 111 (1969), and is printed in Appendix C hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Oregon was entered on February 26, 1969. Petitioner's Petition for Rehearing in that court was denied on May 15, 1969. The mandate from the Supreme Court of the State of Oregon was entered by the Circuit Court of the State of Oregon for the County of Multnomah by order, dated May 27, 1969. The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Is the performance of a dance for an audience a form of expression which, in the absence of any proof of obscenity, is within the protection of the First and Fourteenth Amendments?

2. Where the prohibited conduct: i.e., being bare-breasted, is an integral part of the activity constituting the means of expression; i.e., performance of a dance, does the prohibited conduct, ipso facto, remove the activity of which it is an integral part from the protection of the First Amendment and thus permit the city to prohibit the entirety of the activity as conduct rather than expression, where there is no proof or claim of obscenity by the city as against the activity or the prohibited conduct?

3. May the general police power of the City of Portland extend to a female person while performing her duties as a dancer when said police power is expressed through an ordinance purporting to regulate attire of female persons appearing or being in a place where there is offered for sale, food and alcoholic beverages?

4. Is the ordinance in question constitutionally overbroad because of its inclusion within its terms of a female person performing her duties as a dancer, or otherwise exercising her rights of expression, without the showing of a substantial relationship between the activity sought to be prohibited and a legally permissible legislative objective of the city?

5. Is an ordinance which prohibits females from appearing or being in public view with one or more breasts substantially exposed constitutionally invalid as a penal statute by reason of its vagueness?

6. Does the ordinance in question deny petitioner equal protection of the laws by prohibiting her from

performing her duties as a dancer with one or both breasts substantially exposed in places where food or intoxicating beverages are sold for consumption on the premises where no such restriction exists as to comparable performances in other places; i.e., theaters or other places of entertainment?

7. May a city in any circumstances prohibit a female person from appearing or being with one or both breasts substantially exposed to public view in a place serving food or alcoholic beverages for consumption on the premises?

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

Sec. 16-917 of the Police Code of the City of Portland

Female Attire in Places Serving Food or Liquor.

"It is unlawful for any female person to appear or be in a place where there is offered for sale, food or alcoholic beverage, for consumption on the premises, so costumed or dressed that one or both breasts are wholly or substantially exposed to public view."

Amendment I to the Constitution of the United States

Freedom of religion, speech, and press; right to assemble and petition.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the peo-

ple peacefully to assemble, and to petition the Government for a redress of grievances."

Amendment XIV, § 1 to the constitution of the United States

Citizenship; privileges and immunities; due process; equal protection.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On December 9, 1965, the City Council of Portland, Oregon, passed an ordinance, effective January 9, 1966, amending Ordinance No. 76339, its Police Code, by adding thereto a new section, numbered, entitled and reading as follows (hereinafter referred to as Section 16-917):

"It is unlawful for any female person to appear or be in a place where there is offered for sale, food or alcoholic beverage, for consumption on the premises, so costumed or dressed that one or both breasts are wholly or substantially exposed to public view."

Defendant was arrested for violating Section 16-917. The complaint filed in the action accused her of being in a place serving food and alcoholic beverages for consumption on the premises while so costumed or dressed that both breasts were substantially exposed to public view. In the municipal court, which is not a court of record, defendant filed a demurrer to the complaint contending among other things that the ordinance under which the complaint was drawn was unconstitutional under the provisions of the First and Fourteenth Amendments to the Constitution of the United States. The municipal court rendered its opinion (Appendix A hereto) and overruled defendant's demurrer. Defendant then was tried by the court, found guilty and fined $200. She appealed from the municipal court to the circuit court, where she again filed a demurrer on the grounds, among others, that the ordinance under which the complaint was drawn was unconstitutional under the provisions of the First and Fourteenth Amendments to the Constitution of the United States and that the ordinance was unconstitutional in that it was vague and indefinite and discriminatory.

After oral argument on the demurrer, the parties on September 6, 1967, stipulated in writing for the purposes of the demurrer that

> "the defendant at the time and place mentioned in the Complaint herein was performing her duties as a dancer."

The trial court on September 6, 1967, rendered its

Memorandum Opinion (Appendix B hereto) and on September 26, 1967, entered its judgment order sustaining defendant's demurrer and dismissing the city's complaint. The city then appealed to the Oregon Supreme Court which entered its divided decision, 5-2 (Appendix C hereto) on February 26, 1969, reversing the circuit court and remanding the case with instructions to overrule the demurrer.

Defendant then filed a Petition for Rehearing contending as follows:

1. The court erred in testing the constitutionality of the ordinance as it applied to defendant, a dancer, by its application to other persons who might validly come within its scope.

2. The court erred in failing to find that dancing is a means of expression and communication entitled to the protection of the First Amendment on an equal basis with comparable forms of communication, i.e., motion pictures.

3. The court erred in not holding that the ordinance was void for vagueness.

4. The court erred in not holding that the ordinance in question violated the equal protection clause of the 14th Amendment in that its application to defendant constitutes an unconstitutional classification.

The Petition for Rehearing was denied without opinion on May 15, 1969.

REASONS FOR GRANTING THE WRIT

The Oregon Supreme Court, a state court of last resort, has decided a federal question of substance not heretofore determined by this Court and it has determined that question in a way probably not in accord with the applicable decisions of this Court. It has also decided the federal question in a way directly contradictory to the decisions of the highest courts of two other states, namely California and New Jersey, and of the Court of Appeals of the District of Columbia.

The primary question is whether or not the performance of a dance is within the protection of the First Amendment as the same has been made applicable to the states through the Fourteenth Amendment. *In re Giannini*, 446 P.2d 535, 538, cert. den. No. 1132, May 20, 1969, 37 LW 3438.

> "Although the United States Supreme Court has not ruled on the precise question whether the performance of a dance is potentially a form of communication protected against state intrusion by the guarantees of the First and Fourteenth Amendments to the federal Constitution, the very definition of dance describes it as an expression of emotions or ideas. Thus, 'Dancing consists in the rhythmical movement of any or all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas.' (7 Encyclopaedia Britannica (1945) pp. 13-14). The Century Dictionary and Cyclopedia defines dance as follows: 'dance—A

succession of more or less regularly ordered steps and movements of the body, commonly guided by rhythmical intervals of a musical accompaniment; any leaping or gliding movement with more or less regular steps and turnings, expressive of or designed to awaken some emotion. The dance is perhaps the earliest and most spontaneous mode of expressing emotion and dramatic feeling; it exists in a great variety of forms and is among some people connected with religious belief and practice, as among the Mohammedans and Hindus.' (2 The Century Dictionary and Cyclopedia (1914) p. 1450.)

The Supreme Court has held that analogous media of expression, such as motion pictures, come 'within the ambit of the constitutional guarantees of freedom of speech and of the press. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 405, 72 S. Ct. 777, 96 L.Ed. 1098.' (Jacobellis v. State of Ohio (1964) 378 U.S. 184, 187, 84 S. Ct. 1676, 1677, 12 L.Ed. 2d 793 (judgment of the court per Brennan, J.); see also Flack v. Municipal Court, etc. (1967) 66 Cal. 2d 981, 59 Cal. Rptr. 872, 429 P.2d 192.) 'It cannot be doubted that motion pictures are a significant *medium* for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging . . . to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.' (Joseph Burstyn, Inc. v. Wilson (1952) 343 U.S. 495, 501, 72 S. Ct. 777, 780, 96 L.Ed. 1098.) (Fn. omitted; italics added.)'

> The above analysis merely makes applicable to a particular medium the general doctrine that *all* forms of communication, not merely the expression of concrete and definite ideas, *potentially* receive First Amendment protection. 'We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right.' . . . (Winters v. People of State of New York (1948) 333 U.S. 507, 510; 68 S. Ct. 665, 667, 92 L.Ed. 840.)"

The *Giannini* decision is a clear holding, consistent with the tenor of the decisions of the United States Supreme Court that the performance of a dance is a form of communication and expression within the protection of the First and Fourteenth Amendments. The Oregon Supreme Court avoided a direct holding as to whether performance of a dance was or was not a form of expression within the protection of the First Amendment by concluding that even if it was, such protection is lost when one attribute of the performance; i.e., the female being bare-breasted, comes within the proscription of the ordinance. By terming the activity conduct, rather than expression, the court arbitrarily and summarily removed the entire activity from the ambit of constitutionally protected expression.

The relationship between the state's (or city's) power to regulate the serving of food and drink and the prohibition of bare-breasted females is, at best,

somewhat tenuous but, in the ordinary due process approach, it might be saved by the presumption of reasonableness enjoyed by legislative acts generally so that such prohibition might apply to waitresses or other persons closely and necessarily conducted with the area; i.e., the sale and serving of food and drink, of state (and city) regulatory control.

Such a presumption of reasonableness does not exist when the legislative act, as applied, prohibits all or one aspect of a First Amendment activity; here, the performance of a dance. It is manifest error to hold, as the Oregon Supreme Court does, that where the prohibited conduct; i.e., being bare-breasted, is an integral part of the activity constituting the means of expression; i.e., the performance of a dance, that the activity, including the prohibited conduct, is then removed from First Amendment protection, there being no claim or proof of obscenity. This unsupported judicial classification at the threshold of the opinion that the activity does not come within the protection of the First Amendment because it includes as one attribute the conduct which the legislative act seeks to prohibit is completely unsupported by the decisions of this Court . . . and is in contradiction to the current decisions of the highest courts of other states. Thus, it stands in need of review by the Supreme Court of the United States.

Stanley v. *Georgia*, 37 L.W. 4315, 4318 (April 7, 1969).

"Because that right is so fundamental to our

> scheme of ordered liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws."

If the performance of a dance is a form of expression and communication protected by the First Amendment on an equal, or at least a consistent basis with other forms of artistic communication and expression (See Appendix D) such as sculpture or painting, one's common knowledge of the arts can only lead to the conclusion, that being bare-breasted can not be summarily declared by judicial fiat not to be an essential part of the artistic expression, whether it involves the communication of particular thoughts or merely the display of the beauty of the female form. Otherwise, we should put a blouse on Venus de Milo, cover up much of the sculpture that adorns our museums and parks and ban the paintings of Rubens and many other masters.

When a First Amendment freedom is involved, it is manifest error, and certainly not in accord with applicable decisions of this Court, for the Oregon Supreme Court to avoid consideration of the First Amendment problems by making its unsupported conclusion:

> "We do not believe that the interference with communication in the case at bar has enough substance to present a First Amendment question."

References to female wrestlers, an archaic decision regarding women in saloons and legislative restrictions against public exhibition of persons entranced,

hypnotized or deformed are simply not relevant. The Oregon Court presumes to make this threshold (and conclusive) classification without the benefit of any authority, judicial or literary (See Appendix D). In the case of an ordinary due process situation, this might be sufficient. But where the subject; i.e., performance of a dance, is itself a First Amendment freedom, this unsupported preliminary classification purports to assume as a premise that which is the fundamental issue.

If the performance of a dance is a form of expression and communication within the First Amendment, it does not ipso facto lose that status by the fact that the performer is bare-breasted. The statement by the Oregon court that it is conduct not expression which the city seeks to regulate is not a magic wand which somehow removes the expressive activity from the ambit of constitutional protection. Whether we take the position the the court cannot balance away First Amendment freedoms or the position that there is a limited area for the application of permissible balancing of interests, the interest of the state in these circumstances does not justify a flat prohibition of one aspect of this significant means of artistic expression. The approach of the Oregon Supreme Court is flatly opposed to the positions articulated by the United States Supreme Court in

Brown v. State of Louisiana, 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966).

Cox v. *Louisiana*, 379 U.S. 559, 87 S. Ct. 476, 13 L. Ed. 2d 487 (1965).

Burstyn v. *Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952).

Street v. *New York*, 37 L.W. 4321 (April 21, 1969).

Stanley v. *Georgia*, 37 L.W. 4317 (April 7, 1969).

Interstate Circuit v. *Dallas*, 390 U.S. 676, 682, 88 S. Ct. 1298, 20 L. Ed. 2d 225, 231 (1968).

As was stated by the United States Supreme Court in *Freedman* v. *Maryland*, 380 U.S. 51, 57, 85 S. Ct. 734, 13 L. Ed. 2d 649, 654 (1965):

> "Although the Court has said that motion pictures are not necessarily subject to the precise rules governing any other particular method of expression, Joseph Burstyn, Inc. v. Wilson, 343 US 495, 503, 96 L ed 1098, 1106, 72 S Ct 777, it is as true here as of other forms of expression that [a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, supra, 372 U.S. at 70, 9 L. Ed. 2d at 593.

The basic premise of the Oregon Supreme Court is diametrically opposed to decisions of the highest courts of New Jersey and California and the Court of Appeals of the District of Columbia.

In re Giannini, 446 P.2d 535, 540 (Calif., 1968).

> "In light of this approach, the performance of a dance indubitably represents a medium of protected expression."

Hudson v. *United States*, 234 A.2d 903, 905 (fn.) (D.C., 1967).

> "... in addition to applying to printed matter, such books and photographs, the same standards such as books and photographs, the same standards are also extended to motion pictures, plays, and burlesque shows, which are forms of speech and prima facie expressions protected by the First Amendment."

Adams Newark Theater Co. v. *Newark*, 126 A.2d 340, 342 (N.J., 1956).

> "Recent decisions make it plain that the presentation of moving pictures and stage shows definitely comes within the protective ambit of constitutional free speech."

> See, also, *Adams Theatre Co.* v. *Keenan*, 96 A.2d 519 (N.J., 1953); *Adams Theater Co.* v. *Newark*, 120 A.2d 496 (N.J., 1956); *City of Newark* v. *Humphries*, 228 A.2d 550 (N.J., 1967).

Once the defendant's activity; i.e., dancing, is recognized as a form of expression and communication protected by the First Amendment, and that it does not lose that status because of the city's attempt to prohibit one attribute of that activity, the ordinance is also subject to constitutional attack on other grounds:

1. The ordinance, as a criminal statute applied to a First Amendment activity, is over-broad and constitutes a prior restraint unless by its terms or its en-

forcement it is limited to such areas of activity, if any, where such conduct, if it is deemed inappropriate, may constitutionally be restricted, that is, where it does not inhibit an activity within the ambit of the First Amendment.

2. The terms of the ordinance are unconstitutionally vague as to the permissible degree of exposure.

3. The legislative classification is patently unreasonable and denies defendant the equal protection of the laws. It does not apply to a performance by a bare-breasted dancer in a theater or any other place where food and alcoholic beverage is not served for consumption on the premises. There is no vital difference between a performance where the price of admission is the purchase of a ticket as compared to the purchase of food or drink and, possibly, payment of a cover charge. If there is some evil to be apprehended from this conduct, certainly the evil is lesser where minors are excluded from attendance. Thus, the classification is patently unreasonable.

For these reasons, it is respectfully contended that this Petition for Certiorari should be granted.

Respectfully submitted,

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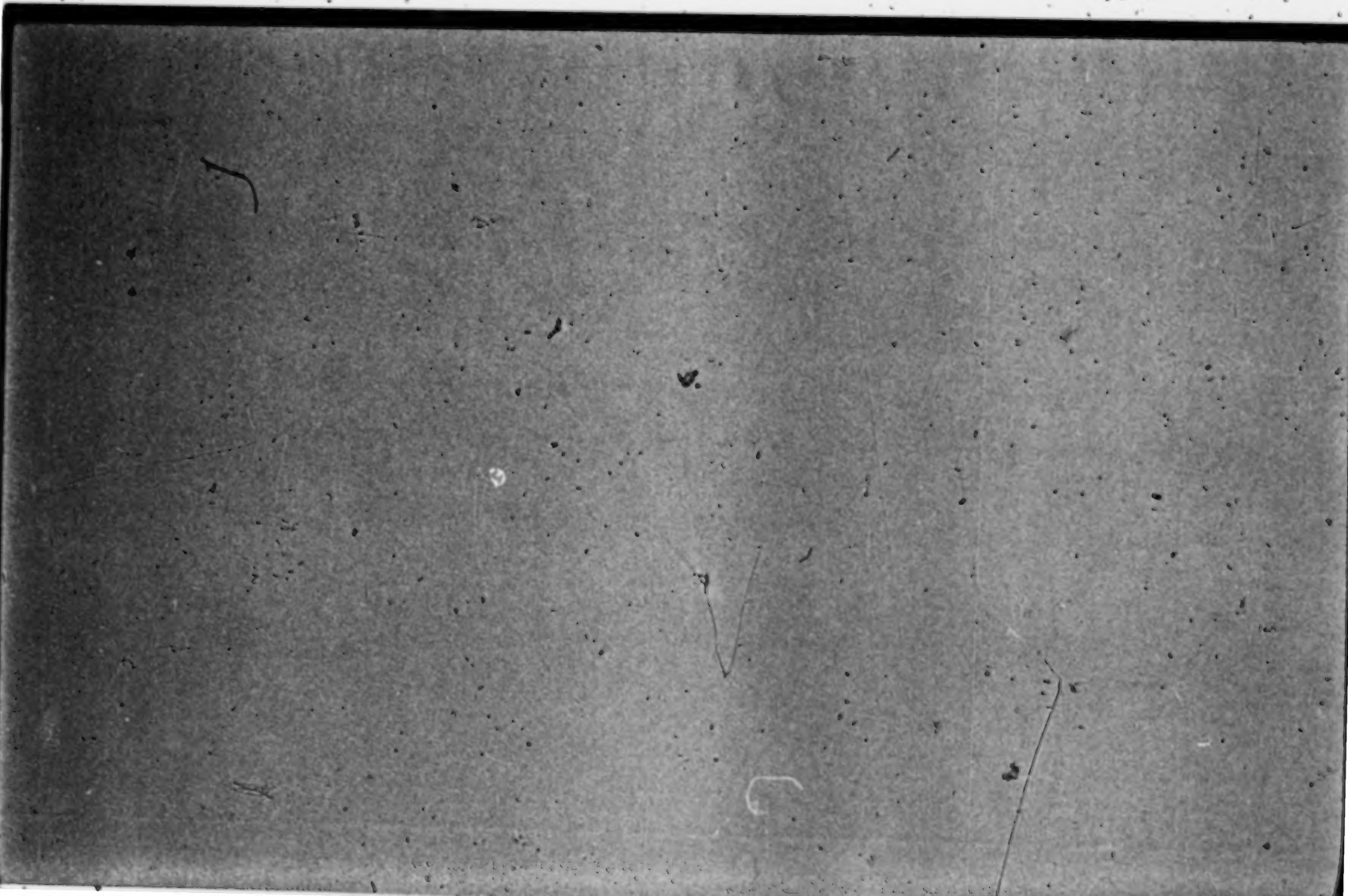

APPENDIX A

MEMORANDUM OPINION OF PHILIP T. ABRAHAM, MUNICIPAL COURT JUDGE

Each of the defendants in this matter is charged with a violation of Section 16-917 of the City of Portland Police Code which reads as follows:

> "*Section 16-917.* FEMALE ATTIRE IN PLACES SERVING FOOD OR LIQUOR.
>
> It is unlawful for any female person to appear or be in a place where there is offered for sale, food or alcoholic beverage, for consumption on the premises, so costumed or dressed that one or both breasts are wholly or substantially exposed to public view."

The pertinent part of the complaints filed against these defendants for alleged violation of the above quoted Section provide as follows:

> "The above named defendants on December 6, 1966 within the corporate limits of the said City of Portland, Oregon, did wilfully and unlawfully commit an unlawful act in that certain place, to wit, 1033 N. W. 16th Avenue, said place offering for sale food and alcoholic beverage, for consumption on the premises, said defendants being on said premises so costumed or dressed that both breasts were substantially exposed to public view."

Section 16-917 was made law by Ordinance No. 121578 passed by the City Council on December 9, 1965. The findings of the City Council in that Ordinance provide as follows:

> "Section 1. The Council finds that the trend toward a greater degree of undress by women employes of restaurants and liquor outlets in the City has become a competitive commercial exploitation of the female that is offensive and adverse to the public morals; that it is in the best interests of the peace, safety and good order of the City that Article 9 of Ordinance No. 76339, the Police Code, be amended to include a section pro-

hibiting certain female attire in places serving food or liquor, or both, for consumption on the premises, as hereinafter set forth * * *."

The defendants, through their counsel, have demurred to the complaints on the ground that the facts alleged therein do not constitute a crime and in support of this position, defendants contend that Section 16-917 is unconstitutional in that it is vague and indefinite and provides no standard for enforcement, and that it is discriminatory to public places engaged in the sale of food or alcoholic beverages, all of which is violative of the First and Fourteenth Amendments of the United States Constitution and Article 1, Sections 8, 11 and 20 of the Oregon Constitution.

In reviewing the Memorandums filed by the parties hereto, the Court is of the opinion that there are two basic questions involved which should be given consideration. Firstly, does Section 16-917 contain a statement of the act or acts constituting the purported offense in a plain and concise manner so as to fully apprise a citizen of what might or might not constitute a violation; and secondly, is Section 16-917 a denial of equal protection of the law in that it applies only to females in places engaged in the sale of food or alcoholic beverages?

The defendants raise other points which will be briefly discussed. Defendants claim that Section 16-917 is a denial of one's right of free expression. The Court cannot agree with this contention. Under the police power, the City through its City Council can legislate against activity which it finds to be detrimental to the public welfare in matters of health, safety and morals and it is no part of the judicial function to determine the wisdom or folly of such a regulation. *L'Hote* v. *New Orleans*, 177 US 587, 44 L ed 899. There is no constitutional guarantee that a woman may appear in public with her breasts exposed to public view.

Defendants further contend that Section 16-917 is designed for enforcement against female dancers only. A reading of the Section does not support this view. In fact, the Section clearly applies to *all* female persons in places where food or alcoholic beverage is offered for sale.

Defendants also contend that Section 16-917 is a denial of equal privileges in that it is class legislation directed only against places serving food or alcoholic beverages. Again, a reading of the Section does not support this contention. The Ordinance is directed against females appearing in such places and not against the places or the owners thereof.

Defendants contend that the Ordinance deprives them of property rights without due process of law. Were the Section limited to a specific female occupation, as defendants seem to claim, then perhaps a property right would be involved. However, the Ordinance applies to all females and not specifically to any occupation. Whether one may or may not appear in public with exposed breasts, as such does not involve a constitutionally protected property right in the opinion of the Court.

Defendants contend that Section 16-917 is unconstitutional in that it discriminates against females. In *State* v. *Hunter*, 208 OR 282 (1956), the Oregon Supreme Court reiterated the proposition that by nature citizens are divided into two great classes of men and women in the recognition of this classification by laws having for their object the promoting of the general welfare and good morals does not constitute an unjust discrimination. The Court can take judicial notice of the fact that there is a difference between the male and the female breast.

This Court holds that the City Council may under its police power prohibit or limit a female person from appearing in public with breasts exposed to public view. The Court will next consider the two basic questions noted at the outset of this memorandum. That is, whether Section 16-917 is vague and indefinite in violation of the due process clauses of the Oregon and Federal Constitutions, and whether Section 16-917 denies equal protection of the law as protected by the Oregon and Federal Constitutions in that it is limited in application to women appearing in places selling food or alcoholic beverage.

Due process requires that an Ordinance stating a penal offense must express itself with clarity so that those who are about to engage in the conduct which

it endeavors to prohibit may know by reading the Ordinance that they will be subject to punishment if they proceed. There must be a standard expressed with such clarity that persons of common intelligence, after reading the Ordinance, will not be compelled to guess as to its import or be unable to determine with reasonable certainty those to whom it is applicable. The standard need not be defined with such precision, however, that those affected by it will never be required to hazard their freedom upon clearly foreseeing the manner in which a matter of degree will be resolved by jury. The courts realize the insufferable difficulty which a legislative draftsman would encounter if he were required to describe with precision every act which people may commit in carrying on a segment of their activities. The question in the instant cases is whether the words "so costumed or dressed that one or both breasts are wholly or substantially exposed to public view" meet the requirements set forth.

As noted in the City's Brief, all of these words are words of common usage, and in construing such words they should be given their natural, plain and obvious meaning. The Court is of the opinion that when the aforementioned words are considered in context, they provide an adequate standard and are sufficiently clear to one who seeks to obey the law as opposed to one who is seeking a "loophole." The Court can see no more difficulty in determining what is meant by the words in question than is encountered in determining what is meant for example, by "under the influence of intoxicating liquor." There are numerous Oregon decisions which have upheld the expression "under the influence of intoxicating liquor" as being sufficiently definite, yet it obviously requires a defendant to exercise some degree of guesswork in determining whether his opinion of what is "under the influence" will be the same as that of the trier of the facts.

The Court cannot see any other wording the legislative body might have employed in lieu of "substantially exposed to public view" which would more clearly express the legislative intent. The use of the word "substantially" in the same phrase with "wholly" indicates a legislative intent to bar the full exposure of the breasts to public view as well as to in-

clude a "token effort" to cover a portion of the breasts so that they could not be classifed as being wholly exposed. The Court interprets "substantially exposed" to mean "almost wholly exposed."

The words in question sufficiently convey a definite warning of the prohibited conduct when measured by common understanding and practices. This is all that the Constitution requires. *U.S.* v. *Petrillo*, 332 US 1, 91 L ed 1877; *Roth* v. *US*, 354 US 477, 1 L ed 2nd 1498 (1957).

The second basic question is whether Section 16-917 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 20 of the Oregon Constitution. These two constitutional provisions are alike in that they constitute similar limitations upon legislative action for the protection of the individual from arbitrary and capricious legislation. It is not required that a law shall affect all persons exactly alike but there is a guarantee of like treatment to all persons similiarly situated. The legislative body has the power to classify the subjects of legislation but such classification must not be arbitrary and unreasonable. In *State* v. *Pirkey*, 203 Or 697 (1955), the majority opinion referring to a past opinion of the court by Justice Rossman, states at page 704:

> "A class of persons may be singled out and special burdens may be placed upon them provided the class manifests characteristics which to a real and substantial extent distinguish it from all other persons and justify the imposition of the burden * * *."

In the instant case, the City Council has seen fit to prohibit females with breasts wholly or substantially exposed from appearing or being in a place where food or alcoholic beverage is offered for sale. The enactment, however, does not prohibit females with breasts wholly or substantially exposed from appearing in other public places. The specific question is whether this classification is reasonable.

In the case of *Buck* v. *Bell*, 274 US 200, 71 L ed 1000, (1926), the United States Supreme Court upheld a law providing for sterilization of mental defec-

tives in State mental institutions against an argument that it violated the equal protection clause because it did not apply to a far greater number of mental defectives outside the institutions. In *West Coast Hotel Co.* v. *Parrish*, 300 US 379 (1937) the United States Supreme Court stated that the legislative body is free to recognize degrees of harm and that a law which hits an evil where it is most felt will not be overthrown because there are other instances to which it might have applied.

In the instant case, as noted earlier, the City Council has made certain findings regarding the competitive commercial exploitation of the female in a condition of undress in restaurants and liquor outlets. The Court should not atempt to second-guess the City Council in this regard. This is particularly true where the legislation is an exercise of the police power and does not attempt to limit the traditional constitutional guarantees of freedom of religion, speech, press, peaceable assembly, and the right to petition for redress of grievances.

Ordinances and statutes are presumed to be constitutional and will be declared invalid only if the unconstitutionality appears beyond a reasonable doubt. This burden the defendants are required to carry and in the opinion of the Court, this they have failed to do.

For the reasons set forth, the Court is overruling the defendant's demurrer on all grounds. Counsel for the City will prepare an appropriate order.

Dated at Portland, Oregon this 24th day of February, 1967.

PHILIP T. ABRAHAM
Judge

APPENDIX B

MEMORANDUM OPINION OF JAMES M. BURNS, CIRCUIT COURT JUDGE

I. INTRODUCTION:

Defendant Derrington is here trying to cover her allegedly substantially exposed breasts in the folds of the First Amendment to the United States Constitution. I do not know what James Madison, the Framer of the First Amendment, would have said, if told in 1789 that in 1967 his noble words would, along with a pair of "pasties," be claimed as a constitutional shield for this bosomy female display. Even if, as I think, he would regard this contention as bizarre, at the least, nonetheless, the recent decisions of the United States Supreme Court compel me to give serious scrutiny to defendant's contention. It can be summarized as follows:

a) Defendant at the time and place alleged in the complaint was a dancer;[1]

b) Dancing[2] is a form of expression protected by the First Amendment; and

c) A city (or state) cannot constitutionally punish *any* mode of expression unless it falls within the narrowly limited category of "obscenity" as defined by the U. S. Supreme Court.

II. HISTORY OF CASE:

Defendant[3] was charged in the Portland Munici-

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[1] Although the complaint does not allege her status as a dancer at the time and place alleged, the parties have stipulated that, on demurrer, I may consider that she was. This stipulation applies to Derrington only.

[2] This is admitted by the city; City's Memorandum in Answer to Defendant's Demurrer, p. 4.

[3] Defendant Derrington was one of six defendants in the Municipal Court; whatever is said here is applicable only to her, and to the other defendants who were dancers at the time alleged in the complaint, and, further, applicable only insofar as the parties may have, by stipulation, agreed that the result on one appeal would be applicable to all others, or to all others similarly situated.

pal Court with violating the Police Code, Sec. 16-917, by a complaint filed December 8, 1966; it alleged that on December 6, 1966, while at a place in the city which offered for sale food and alcoholic beverages for consumption on the premises, defendant was on those premises "so costumed or dressed that both breasts were substantially exposed to public view."

The ordinance reads as follows:

"Section 16-917. FEMALE ATTIRE IN PLACES SERVING FOOD OR LIQUOR.

It is unlawful for any female person to appear or be in a place where there is offered for sale, food or alcoholic beverage, for consumption on the premises, so costumed or dressed that one or both breasts are wholly or substantially exposed to public view."

This ordinance was enacted December 9, 1965, after the council had made the following findings:

"Section 1. The Council finds that the trend toward a greater degree of undress by women employees of restaurants and liquor outlets in the City has become a competitive commercial exploitation of the female that is offensive and adverse to the public morals; that it is in the best interests of the peace, safety and good order of the City that Article 9 of Ordinance No. 76339, the Police Code, be amended to include a section prohibiting certain female attire in places serving food or liquor, or both, for consumption on the premises, as hereinafter set forth * * *."

Defendant demurred in Municipal Court on substantially the same grounds as here. After careful consideration, Judge Philip T. Abraham, in a memorandum opinion dated February 24, 1967, overruled the demurrer. Thereafter, defendant was found guilty and ordered to pay a fine of $200. From this judgment dated March 8, 1967 defendant filed this appeal. She demurred, contending, among other things, that the ordinance was an unconstitutional restriction upon her "freedom of expression" as a dancer, under the First Amendment as applicable to the State

through the Fourteenth Amendment, and also under the Oregon Constitution, Article I, Section 8. Plaintiff and defendant submitted memoranda and argued orally to the Court, citing cases and authorities in support of their respective positions.

There are two reasons why this matter has been under advisement for so long. First, I am required to give the most careful consideration to any First Amendment claim, *Ashton* v. *Kentucky*, 384 US 195, at 200; 86 S. Ct. 1407, at 1410, regardless of how vulgar and offensive the mode of expression may seem to me or to most of the community, including, obviously, the City Council. Second, when claims of First Amendment freedoms clash with the "obscenity" doctrine, we are thrust in a field so vague and indefinite that it makes study of medieval theology as easy as learning the ABCs.[4]

III. OREGON SUPREME COURT DECISIONS:

We first consider the Oregon decisions. Twice, in recent years, the Oregon Supreme Court has had occasion to consider the field of obscenity. In its most recent case, *City of Portland* v. *Welch*, (1961) 229 Or 308, the Court reversed a conviction of Welch, who was prosecuted for having shown a movie without first having eliminated certain scenes as directed by the chief of police under the terms of the Portland censorship ordinance. The Court found such a lack of constitutional standards, plus forbidden prior restraint, so as to condemn the ordinance. The Court did say that "*State* v. *Jackson*, 224 Or 337, points the way to a constitutional method for protecting the legitimate public interest in freedom from commercial filth." But the Court said that neither the city council or any other censor could usurp "the function of judge and jury" in providing "protection against *purveyors* of obscenity." 229 Or at 322. (Emphasis supplied).

In *State* v. *Jackson*, (1960) 224 Or 337, the Court

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[4] See one of the many law review articles criticizing the 1966 decisions, Semonche, Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation, 13 U.C.L.A. Law Rev. 1173, particularly at 1212.

construed, as constitutional, (the indecent exposure statute) subsection (1) of ORS 167.150, in reversing the trial court's ruling which had sustained a demurrer to the indictment. The indictment alleged that *Jackson* had wilfully and unlawfully sold a book which, in its entirety, was "indecent and obscene, and tending to incite lascivious thoughts and tending to arouse lustful desires." The Oregon courts accepted the American Law Institute Model Penal Code's definition of obscenity as a "proper standard for Oregon courts to follow." That standard and definition is as follows:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *"

This decision, in 1960, came about three and one-half years after the *Roth* case; it was before *Jacobellis* (1964), *Ginzburg* (1966), and *Redrup* (1967), *infra.* In light of these decisions of the U. S. Supreme Court it is questionable how much of the *Jackson* rule remains at least as to First Amendment construction. The Oregon Court in *Jackson*, in adopting the American Law Institute standard, said it was not necessary to prove what the effect was upon the reader or viewer of the allegedly obscene matter so long as its predominant appeal was prurient. In order for material to be obscene it must "generally be judged on the basis of its appeal to the average member of the community" but it could be judged by its appeal to a special audience, for example, children, if it is clearly aimed at such an audience and if there were a strong showing that it was directed "solely or chiefly at a special group." (But see *Ginzburg* v. *U.S.*, 383 US 463, at 465, n. 3). In 1961, the legislature repealed ORS 167.150, and, in its place, enacted what is now ORS 167.151.

IV. U. S. SUPREME COURT DECISIONS:

This court is bound to follow the constitutional doctrine, not only of the Oregon Supreme Court, but also of the U. S. Supreme Court as well. Hence, we must review the opinions of the U. S. Supreme Court.

We commence with *Roth* v. *U. S.*, 354 US 476, 77 S. Ct. 1304. *Roth* was convicted under the federal obscenity statute; the appellant in the companion case, *Alberts*, was convicted under the California obscenity statute. In affirming the convictions, Justice Brennan, writing for himself and five others,[5] held that "obscenity is not within the area of constitutionally protected speech or press." The Court defined obscene material as "material which deals with sex in a manner appealing to prurient interest." The Court, in a footnote to this definition, made what seems to be an approving reference to that section of the American Law Institute Model Penal Code cited and adopted by the Oregon Supreme Court in the *Jackson* case.

The majority also said, "However, sex and obscenity are not synonymous * * *. The *portrayal of sex*, for example, *in art*, literature and scientific works, *is not itself sufficient reason to deny material the constitutional protection* of freedom of speech and press." 77 S. Ct. at 1310. (Emphasis supplied).

Three Justices failed to agree with the majority. Justice Harlan concurred in affirming the California conviction but dissented in affirming the federal conviction of *Roth*. Justices Douglas and Black dissented, essentially on the grounds that under the First Amendment all speech or other communications are protected, whether libelous, obscene, or otherwise.

A recent commentator has pointed out that not only did the *Roth* case mark "the first confrontation of the Court with the constitutionality of obscenity laws," but it also gave an opportunity for the first definition by the Court of what it meant by obscenity. This commentator acidly added that it was "the first and so far the last time that the Court has demonstrated a semblance of unity in deciding a major obscenity case. *Magrath*, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Rev. 7. This is an excellent though severely critical history of the cases.[6]

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[5] The Chief Justice, and Justices Frankfurter, Burton, Clark, and Whittaker.

[6] This article, of course, was written before the 1967 case of *Redrup* v. *New York*, 87 S. Ct. 1414. The article also calls attention to several of the many articles in this field. See, especially, Footnotes 1, 10 and 196-219.

In my opinion, the next significant[7] case in this field came in 1964, with *Jacobellis* v. *Ohio*, 378 US 184, 84 S. Ct. 1676. Ohio prosecuted and convicted Jacobellis on a charge of possession and exhibiting obscene film. The film involved was "The Lovers," which, judging by the number of reported cases in which it was involved, seems to have been seen (at least initially) by more judges and juries than paying customers at the box office.

Justice Brennan announced the judgment of the court in reversing the conviction, and wrote an opinion in which only Justice Goldberg cared to join. While the *Roth* test for obscenity—the prurient interest test—would be adhered to, some new standards seemed to be added. The expression in question, to be forbidden must be "utterly without redeeming social importance." If the material deals "* * * *with sex in a manner* that advocates ideas * * * or *that has* literary or scientific or *artistic value or any other form of social importance*, (it) may not be branded as obscenity and denied the constitutional protection." (Emphasis supplied). 84 S. Ct. at 1680.

Significantly, also, Justice Brennan's opinion went on to state that the "contemporary community standards" of the *Roth* test refer to a national rather than a local standard. Further, he emphasized that where material claimed to be obscene involved determination of First Amendment consideration, the Supreme Court, and for that matter any intermediate appellate court or even a trial court, could not avoid an independent judgment "on the facts of the case." 84 S. Ct. at 1678.

In addition to Justices Brennan and Goldberg, four other Justices voted to reverse the conviction. Justice White concurred in the judgment without

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[7] I say significant, not because it can be said to stand for any particular rule, but significant because it demonstrates the increasing fractionalization of the Court. In *Jacobellis*, there were six opinions, on none of which were even three justices able to agree. In *Redrup*, by the spring of 1967, we have one opinion, in which seven joined, but it articulates *four* separate rules. All progress involves change, but does all change involve progress?

opinion. Justice Black wrote an opinion in which Justice Douglas joined on the basis of their consistent denunciation of any censorship under the constitution. Justice Stewart wrote a short opinion in which he stated that he believed the rule to be that under the First Amendment criminal laws would be constitutionally limited to suppression of "hard-core pornography." Justice Stewart said he would not "attempt further to define" the term, mentioned that perhaps he could never succeed in "intelligibly" defining it, and wound up by saying, however, "I know it when I see it."

The Chief Justice (joined by Justice Clark) dissented, stating that he would adhere to the *Roth* rule, and affirm convictions if there were "sufficient evidence" to sustain them. He defined "sufficient evidence" as more than "merely any evidence" and less than "substantial evidence."[8] Justice Harlan, in dissenting, said he would allow the states somewhat more leeway, in cases banning sex treated in "a fundamentally offensive manner," provided they judged the material under "rationally established criteria."

In the spring of 1966 the Court handed down decisions in three cases, *Ginzberg* v. *U. S.*, 383 US 463, 86 S. Ct. 942; *Mishkin* v. *N. Y.*, 383 US 502, 86 S. Ct. 958; *Memoirs* v. *Massachusetts*, 383 US 413, 86 S. Ct. 975. *Ginzberg* involved a conviction under the federal obscenity statute. Justice Brennan, in an opinion joined by four others,[9] affirmed the conviction. Basically, the majority opinion was based upon the fact that the evidence showed that Ginzburg was engaged "in the sordid business of pandering" because his business was selling material "openly advertised to appeal to the erotic interest of their customers." Justice Brennan said the Court was not changing but simply "elaborating" the *Roth* test. He held "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test."

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[8] See Kalven, The Metaphysics of the Law of Obscenity, 1960 Supreme Court Review 1.

[9] The Chief Justice, and Justices Clark, Fortas and White.

The Ginzburg decision evoked what seems to me to be among the strongest dissents ever printed in the U. S. Reports. Justice Black, in dissenting, pointed out his traditional view that the First Amendment forbids any control of speech or expression. Justice Douglas, also dissented on this ground. Justice Stewart dissented, stating that in punishing Gingburg because it disapproved of his "sordid business," the Court was exercising "a power the Court does not possess." He said that in doing so, "We forsake a government of law and are left with a government of Big Brother."

Justice Harlan, in a stinging dissent, called the "pandering" result "an astonishing piece of judicial improvisation." He added, in his dissent in *Memoirs* v. *Massachusetts*, (in what Professor Magrath has called "undoubtedly * * * the greatest understatement of the 1965 term," 1966 Sup. Ct. Rev., at 56) that "no stable approach to the obscenity problem has yet been devised by this Court."

In the *Mishkin* case, the defendant was convicted under a New York obscenity statute for publishing a group of dirty books portraying all sorts of sexual aberrations. Justice Brennan, joined by the same four as in Ginzburg, wrote the majority opinion affirming the conviction. Justice Harlan concurred in the result. Justices Black, Douglas and Stewart each wrote a dissenting opinion.

In *Memoirs* v. *Massachusetts*, the question was the suppressability of the book commonly known as "Fanny Hill." The Massachusetts Supreme Court had affirmed a lower court decision, declaring the book obscene. The U. S. Supreme Court reversed. Justice Brennan wrote an opinion in which he was joined by Chief Justice and Justice Fortas. Justices Black and Stewart concurred in the reversal for reasons separately expressed by themselves in the other cases. Justice Douglas concurred in the reversal, writing his own opinion. Justice Clark dissented, as did Justices Harlan and White, each in a separate opinion. None of these opinions can be spoken of as the opinion of the Court.

The Brennan opinion points out that the Massachusetts court had misinterpreted the *Roth* test be-

cause a book cannot be banned unless "it is found to be *utterly* without redeeming social value." (Emphasis in the original). Thus, even if the mode of expression has both the requisite prurient appeal and the patent offensiveness to community standards, it must be stigmatized by a third scar, namely, it must be "utterly without redeeming social value." When he said "utterly" he must have meant it, because he italicized the word. I search in vain to find any more objectivity in an italicized "utterly" than in Justice Stewart's "I know it when I see it" test.

Finally, we come in this melancholy review, to the May, 1967, case of *Redrup* v. *N. Y.*, 87 S. Ct. 1414, and its two companion cases. These involved three state court decisions either convicting under obscenity statutes or administratively declaring certain publications to be obscene.[10] Seven Justices joined in an unsigned ("Per Curiam") opinion, which noted that among the seven there were four schools of thought.

One school of thought is clearly identifiable as embodying the Black-Douglas "you can't touch a thing" rule; another is Justice Stewart's "I know it when I see it" test; a third, apparently composed of Chief Justice Warren and Justices Brennan and Fortas, seems to endorse the views of the "Fanny Hill" case; fourth and finally, there is the view of Justice White, which is apparently the Fanny Hill test, minus the "social value" judgment as an independent criterion.

After a brief reference to these four views, the opinion stated that "whichever of these constitutional views is brought to bear upon the cases by us, it is clear that the judgments cannot stand." Justice Harlan dissented, joined by Justice Clark. A month later, in June, 1967, on the last day of its term, the Court reversed without opinion a series of 12 or 14 state court cases, citing its "opinion in the *Redrup* case."

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[10] The Arkansas case involved magazines known as "Gent," "Swank," "Bachelor," "Modern Man," "Cavalcade," "Gentlemen," "Ace," and "Sir." The other two cases involved books called "Lust Pool," "Shame Agent," "High Heels" and "Spree."

These later citations are to be found at pages 2091 to 2107 of 87 S. Ct.

It is apparent, from this review, that the job of a judge, especially one of a trial court, when testing a claim of constitutionality in the obscenity field, is one of extreme difficulty. *Roth* gave us goalposts, however vague may have been the sidelines. *Redrup*, it seems to me, without intending any disrespect, has taken down the goalposts, and ,if anything, obscured, not clarified, the sidelines."[11]

IV. GENERAL RULES:

General canons of constitutional construction lie readily at hand. Weighted with tradition is our duty "to interpret legislation, if possible, to avoid rendering it invalid." *Crowley* v. *State*, 11 Or 512; *City of Portland* v. *Welch*, 229 Or at 318. Proof that an act is unconstitutional must be highly persuasive. *Eastern and Western Lumber Co.* v. *Patterson*, 124 Or at 149; in order to hold a statute unconstitutional, the conflict between the enactment and the constitution must be plain, clear and palpable. *Wright* v. *Beveridge*, 120 Or at 248. The presumption of constitutionality is one of the strongest. Positive is our duty to give an act constitutional construction if it can be done without wrenching the meaning of words. *State* v. *Jackson*, 224 Or at 345. Courts must resolutely renounce their own notions of what public policy ought to be, for it is not for [redacted] to make public policy. Rather, it is to be left to those chosen for the policy-making task. But, as Justice Holmes taught us, "General propositions do not decide concrete cases." And as judges, we owe fealty to the Constitutions of the State and Nation, in all their vigor and force. We are required to adopt and obey all explicit readings of the U. S. Constitution by the U. S. Supreme Court, and those fairly implied thereby, regardless of any contrary personal preferences. This is our duty, how-

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[11] Justice Cardozo probably had this in mind when he spoke of the First Amendment guarantees as being "generalities that were pregnant with uncertainty." Cardozo, Paradoxes of Legal Science, 102.

ever vulgar and garish may be the conduct of the prisoner in the dock.[12]

It seems to me, under the *Redrup* cases, the only guidance we have, as to what material is immune, and what is not, is the following language:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645; cf. Butler v. State of Michigan, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S. Ct. 813, 96 L. Ed. 1068. And in none was there evidence of the sort of "pandering" which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31." 87 S. Ct. 1415.

V. THREE AREAS OF PERMISSIBLE CONTROL:

Does the case at bar fit fairly within one or more of the three areas of implied permissibility for governmental action in the field of expression? Can it be contended that the ordinance here reflects "a specific and limited state concern for juveniles."? The establishment in which the defendant was dancing at the time of the arrest did not permit juveniles on the premises. ORS Ch. 472, particularly ORS 472.310. There is no "finding" in the ordinance that the baring of breasts by females in places serving liquor is likely to bring about undesirable conduct by juveniles.

For an instance in which a specific and limited legislative ban has been upheld, see *Chemline, Inc.* v. *City of Grand Prairie*, 364 F2d 721. Plaintiff oper-

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[12] Justice Frankfurter once said "Many of our Constitutional liberties have been forged in controversies involving not very nice people."

ated a drive-in theater, showing nude movies. It sought to enjoin defendant city from enforcing an ordinance which outlawed exhibition of movies showing "bare female breasts" where visible from adjoining public highways. Plaintiff's drive-in theater bordered a public highway on which many youngsters traveled. Other evidence tended to show a harmful effect on children. The movies were not only readily available to juveniles but were forced to be seen by all members of the public who traveled that particular highway. The Fifth Circuit upheld the ordinance. See also *Interstate Circuit* v. *City of Dallas*, 249 F. Supp. 19.

The second area of implied permissibility for such legislation would exist where the mode of expression was by means of "an assault upon individual privacy * * * in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." This area would certainly seem to authorize an ordinance banning topless dancers in the Park Blocks. At least, I think, it would encounter in the U. S. Supreme Court a climate of judicial welcome, not hostility. But here, the unedifying spectacle was not thrust upon unwilling members of the public. I am cited no cases, or ordinances, which makes it against the law *not* to go to a "topless" night club.

The third suggested area of permissibility is one in which there is evidence of Ginzburg type pandering. If the ordinance were directly aimed at the proprietor of the night club, and if the council legislatively found that the promotion and advertisement of topless dancers was solely for the salacious purposes singled out and condemned in *Ginzburg*, we would probably have a different case. Indeed, ordinance findings implicitly suggest that the pandering—"commercial exploitation"—is by the proprietor. But defendant is the dancer, not the promoter. It was Ginzburg who was prosecuted and convicted; left untouched was the female who posed for the nude photographs so widely published by Ginzburg.

It does not seem possible, even on demurrer, to fit this ordinance within any of the three areas of per-

missible regulation envisioned by the Court.[13]

VI. CONCLUSION:

We are told by the Court that:

> "Material dealing with sex in a manner * * * that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection." 84 S. Ct. at 1680.

And we are further required to test these matters by a national, not merely a local, standard.

In our country, today we see a ballet with bare-breasted females—the Ballet Africaines; the Dancers Workshop of San Francisco presented at Hunter College a performance including completely nude male and female dancers; "topless" waitresses abound, both in San Francisco and Los Angeles as well as in New York, (People v. Boreta, et al, K-26576, unreported, Municipal Court, San Francisco, May 7, 1965); topless bathing suits for women are widely advertised and sold; seeing all this, can we say that a female dancer who substantially exposes her breasts as a part of the dance is presenting artistic material "*utterly*" without redeeming social value?[14] Can it be said that a ballet of primitive Africans—bare-breasted females—is not utterly without redeeming social value, but the tawdry performance by a night club dancer with "pasties" on her breasts is?

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[13] It should be noted that the ordinance was drawn in 1965, four months before the decisions in *Ginzburg*, *Mishkin* and *Memoirs*, and a full year and a half before the *Redrup* and its companion cases. Consequently, nothing herein should be construed as derogatory to the City Attorney for his drafting job. It is one thing to read and apply *Redrup;* it is far more difficult to *predict* it.

[14] Just the other day the "Ladybirds"—a "topless" female musical group—opened in Las Vegas. The only protest was from the musicians local union. Its contention was that while "topless" was all right for dancers, it was undignified for musicians. The National Union overruled the local and the Ladybirds sang topless!

Neither nudity nor sex is obscene per se. *People* v. *Kukkanen*, 56 Cal. Rptr. 620; *Excelsior Pictures* v. *Regents*, 156 NYS2d 800.

With the utmost reluctance, I am compelled to conclude that a majority of the U. S. Supreme Court, if this case were before it, would hold that a dancing performance in a night club, where juveniles are not permitted, and where patronage is voluntary, and where the one sought to be prosecuted is the dancer, not the proprietor, would not be "*utterly*" without redeeming social value, merely because the dancer was a female whose breasts were either wholly or substantially exposed. *Redrup* v. *N. Y.*, 87 S. Ct. 1414.[15]

Because I can believe my duty to be to follow and apply the law pronounced by the U. S. Supreme Court the demurrer will be sustained, on First Amendment grounds, *as it applies to this defendant, as a dancer, under the ordinance as drawn.*[16] Nothing contained in this opinion should be construed to suggest that a similar result would obtain if the defendant were the proprietor,[17] or if the defendant were a waitress or shoe shine girl, or if the premises regularly had substantial juvenile patronage, or if the performance was thrust upon an unwilling public.

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[15] When the Supreme Court Justices, in *N.A.A.C.P.* v. *Button*, 371 US 415, at 433, 83 S Ct 328, at 338, said that "First Amendment freedoms need *breathing space* to survive * * *", I doubt that they realized that defendant Derrington would appear, only four years later, to interpret, so fulsomely, their expansive language.

[16] Sec. 16-917 does not describe the activity as "lewd," "indecent," or "obscene"; nor does it refer to the existing definition of obscenity in the Police Code; Sec. 16-3201 et seq. Cf: Police Code Sec. 16-102.

[17] See e.g., ORS 161.220, or any other applicable City Ordinance, designed to punish those who aid and abet. A prosecution of the proprietor would, of course, permit consideration and evaluation of the "pandering" aspects which were significant, if not decisive, in sustaining the conviction of *Ginzburg*.

Since the defendant has made no claim that the field has been preempted by state law, nothing said here should be considered as bearing on that question. See the leading California preemption case, *In re Lane*, 372 P2 897. For California "topless" cases see also *Robins* v. *County of Los Angeles*, 56 Cal. Rptr. 853, *People* v. *Kukkanen*, 56 Cal. Rptr. 620 at 623, and *In re Davis*, 51 Cal. Rptr. 702.

In view of this disposition of the case, it makes it unnecessary for me to consider defendant's contention that the ordinance is void for vagueness. Perhaps the vagueness claim is less meritless than I thought at the time of oral argument. But in any event, a thorough evaluation of this contention could not be had in advance of trial. Under the facts, defendant might well not have standing to urge the void for vagueness claim.

The other contentions asserted by the defendant such as the denial of equal rights, denial of due process, etc., lack sufficient merit to justify discussion of them.

The City Attorney is requested to submit an appropriate order sustaining the demurrer. The order should be so phrased as to afford every opportunity to the City for exercising any appeal rights which it may have, if it desires the Supreme Court to review this ruling.

I reiterate that in so far as humanly possible, I have tried to put aside my own opinions in arriving at what, for me personally, is a grossly distasteful decision. I regret that the U. S. Supreme Court cases compel me to reach this result.

Very truly yours,

JAMES M. BURNS

JMB/i

APPENDIX C

No. 9099—February 26, 1969

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

CITY OF PORTLAND, *Appellant, v.*
CAROL DERRINGTON,
Respondent.

Appeal from Circuit Court, Multnomah County.

JAMES M. BURNS, Judge.

Argued and submitted December 2, 1968.

Richard A. Braman, Deputy City Attorney, Portland, argued the cause for appellant. With him on the brief were Alexander G. Brown, City Attorney, and Ellis E. Gerdes, Deputy City Attorney, Portland.

George A. Haslett, Jr., Portland, argued the cause and filed a brief for respondent.

Before PERRY, Chief Justice, and MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and HOLMAN, Justices.

REVERSED AND REMANDED.

GOODWIN, J.

The City of Portland appeals from a judgment of the circuit court, upon a demurrer, the effect of which was to declare unconstitutional Section 16-917 of the City of Portland Police Code.

The ordinance provides as follows:[1]

"It is unlawful for any female person to appear or be in a place where food or alcoholic beverage

[1] The section was amended by Ordinance No. 125704, November 10, 1967. The amendment rearranged the wording and the punctuation, but did not change the content of the section.

is offered for sale for consumption on the premises, so costumed or dressed that one or both breasts are wholly or substantially exposed to public view."

The defendant's demurrer to a complaint charging a violation of the quoted section was accompanied by a stipulation that the defendant was employed as a dancer. The trial court held that dancing is a form of communication and thus is entitled to the free-speech protection of the First Amendment. While the trial court attempted to restrict its ruling to a case brought against a dancer, the judgment necessarily struck down the ordinance as it might apply to waitresses and other employes.

The California Supreme Court recently overthrew an "indecent-exposure" statute, holding that "topless" dancing is a mode of expression. See *In re Giannini*, — Cal 2d —, 446 P2d 535, 72 Cal Rptr 655 (1968). When the challenged ordinance is tested solely with reference to its effect upon freedom of expression, it is difficult to disagree with the reasoning of the trial court and of the majority of the California court. We believe, however, that there is a valid distinction between conduct, which the government can regulate, and speech, which enjoys a high degree of immunity from regulation. *Cox v. Louisiana*, 379 US 559, 563-564, 85 S Ct 476, 13 L Ed 2d 487 (1965).

Once a court concludes that the performances and costumes of female attendants in bars and taverns can be regulated only within the First Amendment limits upon the powers of the government to regulate speech, there is no limit but obscenity, whatever that is,[3] to

[3] See Redrup v. New York, 386 US 767, 87 S Ct 1414, 18 L Ed2d 515 (1967), a per curiam opinion that reveals the existence within the court of at least four different points of view on the constitutionality of obscenity laws.

the commercial exploitation of the weak, the foolish, and the deformed.[3] Neither the state nor the federal constitution requires a construction that would so limit the legislative function of city government. In cases of this kind, the court must look to the substance of the regulation and ask whether the elements of communication which may be present in the regulated conduct are significant enough to bring the entire course of conduct under the protection of the First Amendment. *Schneider v. State,* 308 US 147, 161, 60 S Ct 146, 84 L Ed 155 (1939).

The preamble to the challenged ordinance reads as follows:

> "The Council finds that the trend toward a greater degree of undress by women employes of restaurants and liquor outlets in the City has become a competitive commercial exploitation of the female that is offensive and adverse to the public morals; that it is in the best interests of the peace, safety and good order of the City that Article 9 of Ordinance No. 76339, the Police Code, be amended to include a section prohibiting certain female attire in places serving food or liquor, or both, for consumption on the premises, as hereinafter set forth * * *"

When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employes is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours.

In 1955, the Legislative Assembly was offended by the commercial exploitation of females by wrestling

[3] ORS 167.705 proscribes the public exhibition of persons entranced or hypnotized, and 167.710 proscribes the exhibition of deformed persons.

promoters who had discovered that a segment of the public would pay money to watch women wrestle. See ORS 463.180. We upheld the constitutionality of the proscriptive statute. *State v. Hunter*, 208 Or 282, 300 P2d 455 (1956). Equal privileges and immunities, rather than free speech, had been invoked against the wrestling statute.

In an earlier age of innocence, this court held that the government could, constitutionally, forbid women to frequent, or remain in, saloons, without regard to their state of dress or undress. See *State v. Baker*, 50 Or 381, 385, 92 P 1076, 13 LRA (ns) 1040 (1907). Again, however, speech was not made the issue.

Whether or not we agree with the wisdom of the city council's attempt to legislate morals, the question is not one of legislative wisdom, but one of constitutional power. The chief aim of the ordinance is to regulate conduct deemed by the lawmakers to be injurious to health, safety, and morals. The city's legislative judgment in the matter should be upheld unless the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct. We do not believe the interference with communication in the case at bar has enough substance to present a First Amendment question. The error in the court below was in treating the problem as one of free speech and nothing more.

It has also been argued in support of the demurrer that the ordinance in question is unconstitutionally vague. Because the Circuit Court terminated this litigation on the free-speech issue, it did not reach the more difficult vagueness question. But, since we have concluded that the ordinance did not offend the First Amendment, we now must consider whether the ordinance unconstitutionally offends due process as vague

and indefinite. The ordinance forbids substantial exposure.

The defendant says that a statute making it unlawful to be "so costumed or dressed that one or both breasts are wholly or substantially exposed to public view" could mean virtually anything an arresting officer might want it to mean. If this assertion were literally true, the statute would, of course, be unconstitutionally vague. *Cramp v. Bd. of Public Instruction,* 368 US 278, 82 S Ct 275, 7 L Ed 2d 285 (1961); *City of Portland v. James,* 86 Or Adv Sh 1287, — Or —, 444 P2d 554 (1968).

The vagueness question in the case at bar underscores the difficulty legislators have in attempting to translate clothing mores into positive law. If the ordinance were drawn so as to proscribe only the total exposure of the mammary structures, the city argues, it would be an invitation to evasion by the use of the token coverings referred to in the briefs as "pasties." Apparently the city council deemed pasties inadequate to overcome the supposed evils of pectoral nudity when employed to promote beverage sales, and elected to proscribe substantial as well as total exposure.

While the word "substantial" does not carry the degree of certainty found, for instance, in the Commandment, "Thou shalt not steal," it is not without meaning. In the context of the power of Congress to regulate commerce, for example, the word has proven effective. See *Atlas Building Prod. Co. v. Diamond Block & Gravel Co.,* 269 F2d 950 (10th Cir), cert. denied 363 US 843 (1959), upholding against the challenge of vagueness the proscription against conduct when the effect of such discrimination may substantially lessen competition or tend to create a monopoly.

269 F2d at 955. As Mr. Justice Holmes said, in a Sherman Act case:

> "* * * [T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death * * *." *Nash v. United Statese,* 229 US 373, 377, 33 S Ct 780, 57 L Ed 1232 (1913).

The language in *Nash v. United States* was cited with approval in *State v. Popiel,* 216 Or 140, 337 P2d 303 (1959), and in *State of Oregon v. Wojahn,* 204 Or 84, 282 P2d 675 (1955).

In *State of Oregon v. Wojahn,* we held that the word "reckless" as used in the negligent-homicide law was not unconstitutionally vague. We noted in passing, however, that a statute "which creates a new crime must express itself with clarity so that those who are about to engage in the conduct which it endeavors to prohibit may know by reading the statute that they will be subject to punishment if they proceed." 204 Or at 136.

When the challenged ordinance is examined in the context of its stated purpose, we believe the word "substantial" can be given effect without subjecting the public to harassment by easily offended police officers. We do not believe that the triers of fact in prosecutions under the ordinance will have any more difficulty in determining guilt or innocence than they have in the cases of motorists charged with "reckless" driving, or with driving while under the influence of intoxicants.

Reversed and remanded, with instructions to overrule the demurrer.

O'CONNELL, J., dissenting.

"The performance of a dance for an audience constitutes a method of expression that, in the absence of proof of obscenity, warrants the protection of the First Amendment." *In re Giannini,* 72 Cal Rptr 655, 446 P2d 535, 538 (1968).© The complaint in the present case did not charge defendant with obscene conduct; she is charged only with exposing her breasts while "performing her duties as a dancer." Therefore, it is not necessary to decide whether the city could constitutionally prohibit topless dancing as obscene conduct. If the ordinance had prohibited all dancing for an audience in a place where food and alcoholic beverages were served, I assume that the majority would treat the ordinance as an invalid limitation on First Amendment rights. A proscription limited to dancing with exposed breasts would also violate the First Amendment unless the ordinance were construed to apply only to obscene dancing.

The majority opinion reasons that "[w]hen nudity is employed as sales promotion in bars and restaurants, nudity is conduct," and that "[a]s conduct, the nudity of employes is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours."

Defendant is willing to concede, I think, that "nudity" is "conduct" and subject to regulation. She takes the position, however, that "dancing" is "expression" and therefore is protected by the First Amendment unless it is shown that the dancing is obscene. If defendant's position is sound, and I think that it is, the city cannot inhibit defendant's right

© The city of Portland concedes that dancing can be a form of expression. Appellant's Brief, p. 17.

simply because it decides that her nudity may have an adverse moral effect on the community or that it might cause disturbances in the restaurant. Even if dancing were held to be entitled to less protection than some other forms of expression, certainly it cannot be prohibited merely because a part of the public, even a majority, regards non-obscene nude dancing as unacceptable. See *Kingsley International Pictures Corp. v. Regents*, 360 US 684, 79 S Ct 1362, 3 L Ed2d 1512 (1959). And assuming that such dancing may cause disturbances within the restaurant, there are measures short of depriving citizens of their constitutional rights which the city can employ to control such disturbances.[2]

DENECKE, J., concurs in this dissent.

[2] When such measures are available constitutional rights may not be infringed upon. United States v. Robel, 389 US 258 (1968); Schneider v. State, 308 US 147 (1939).

APPENDIX D

Literary authority

DANCE: A Basic Educational Technique by Frederick Rand Rogers, President, North American Physical Fitness Institute (1941, The MacMillan Company).

This 350 page work, a basic text found in all five of the major libraries in the Portland area, discusses the educational values of dance, classic forms of dance, modern dance, music and dance, dance as spiritual expression, etc. On p. 323, the work lists books recommended to dance educators, and on p. 330, refers to another work as follows:

> "Curt Sachs, *World History of the Dance*, W. W. Norton & Company, 1937. 448 pages, 32 plates.
>
> Educators who would gain a more detailed view of dance through the ages than LaMeri gives, should read this volume. It is the most comprehensive history of dance available in English. Published several years ago, all the thoroughness of German scholarship is manifest in its many separate studies. It contains a discussion of the general types and characteristics of dance, and deals specifically with its forms and symbols, from the Stone Age through classical antiquity, Middle Ages, the eighteenth century, and down to the twentieth century.
>
> Sachs defines dance as 'simply life on a higher level.' This statement reveals the all-inclusive character of the art and suggests its ultimate significance. 'Whoever danceth not knoweth not the way of life,' said Christ in a Gnostic hymn of the 2nd century."

World History of the Dance by Curt Sachs, W. W. Norton Company (1937).

This is an English translation of a monumental historical work by a distinguished German author. The title page of this erudite work shows what appears to be a circular hieroglyph of a primitive dancing pair in an Egyptian motif with the female dancing with both breasts "substantially exposed."

The first few sentences of this author's Introduction to his work reads as follows:

> "The dance is the mother of the arts. Music and poetry exist in time; painting and architecture in space. But the dance lives at once in time and space. The creator and the thing created, the artist and the work are still one and the same thing. Rhythmical patterns of movement, the plastic sense of space, the vivid representation of a world seen and imagined—these things man creates in his own body in the dance before he uses substance and stone and word to give expression to his inner experiences.
>
> The word art does not altogether express this idea. Indeed, one almost fears to use the word, for its present-day significance, exaggerated and at the same time circumscribed, is not sufficient to explain what the dance in all its richness really is. The dance breaks down the distinctions of body and soul, of abandoned expression of the emotions and controlled behavior, of social life and the expression of individuality, of play, religion, battle, and drama—all the distinctions that a more advanced civilization has established."

The Dance by John Martin, dance critic of the New York Times (Tudor Publishing Company, 1946) (p. 6).

> "Dancing is a very broad term, since it includes a multiplicity of activities ranging all the way from

certain natural and instinctive practices of animals, birds and fish to the most elaborate and carefully planned artistic creations of especially gifted men and women. It is all dancing, however, and in spite of many variations in outward appearance and inward motivation, it is all basically the same thing.

This essential unity makes what might seem to be a complex subject actually a very simple one. Once we have grasped the key to its structure we can open at will all of its doors and follow any of its numerous corridors as far as our interest dictates. Sometimes one or another of us without the master key may stumble into a particular corridor by a back entrance, and lacking any awareness of the edifice as a whole, take for granted that this single corridor is all there is to the building. Thus we may find the anthropologist so completely concerned with ceremonial dances of savage tribes that he ignores the ballet as mere idle amusement; or the ballet enthusiast, perhaps, looking down on the folk dance as crude and obsolete; or both of them possibly frowning on the "jitterbug" as an undisciplined vulgarian.

But as a matter of fact, the most sacred ritual dance of a primitive people, the French court ballet and the Lindy Hop are all simply different aspects, different stages of development, of exactly the same thing; at their roots, if we trace them back, we will find them to be quite indistinguishable from each other. They are all outgrowths of what might be called basic dance, which is the same in all parts of the world, in all times and cultures. It is, indeed, a fundamental element of man's behavior. When we have unedrstood what basic dance is, therefore we shall have got hold of the master key."

(p. 105):

"DANCE AS A MEANS OF COMMUNICATION

Indubitably no other art form has been so inaptly named as the "modern dance." Not only is the phrase

non-descriptive, but it is markedly inaccurate, since there is absolutely nothing modern about modern dance. It is, as a matter of fact, virtually basic dance, the oldest of all dance forms. The modern dancer, instead of employing the cumulative resources of academic tradition, cuts through directly to the source of all dancing. He utilizes the principle that every emotional state tends to express itself in movement, and that the movements thus created spontaneously, though they are not representational, reflect accurately in each case the character of the particular emotional state. Because of the inherent contagion of bodily movement, which makes the onlooker feel sympathetically in his own musculature the exertions he sees in somebody else's musculature, the dancer is able to convey through movement the most intangible emotional experience. This is the prime purpose of the modern dance; it is not interested in spectacle, but in the communication of emotional experiences—intuitive perceptions, elusive truths—which cannot be communicated in reasoned terms or reduced to mere statement of fact."

Among the illustrations in the book is a photograph on page 12 of the Uday Shan-kar dance company performing a classical Hindu dance drama; one of the females in the scene is bare-breasted.